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Individual Rights, Hot Off the Press Versus the Right to be Let Alone, ERA: What We Have in Common

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Speaking to the issue

It's no accident that we have aligned articles about freedom of the press, the right of privacy, and the Equal Rights Amendment. They have a common grounding in the nation's unceasing task of defining, protecting and expanding individual rights, as society itself changes in its perception of these rights. In this VOTER, we report developments on all three.

The first two have been undergoing testing and redefinition from the days of our country's beginnings. "Hot Off the Press" offers some first-round reactions to S.1, the proposed act that would totally rewrite the federal criminal code. In almost casual fashion, it would also, according to its critics, rewrite the basic free-press protections enunciated in the First Amendment.

". . . Versus the Right To Be Let Alone" describes the tension between the reporter's right to tell and the private citizen's Fourth-Amendment right not to have it told to the whole world via the press—one important dimension of the right of privacy. This time the vehicle for change has been a new court decision in the case of a private citizen—lawyer for unpopular causes—who successfully sued the John Birch Society for its labeling him a Communist in its magazine. Private citizens have applauded his victory; reporters see themselves hamstrung in doing their job.

So . . . two avenues for probing the limits of individual rights are represented: Congress and the courts. The ERA calls into play a third course: the constitutional amendment. It is a route this nation has often chosen for broadening its protection of individual rights by making ever clearer the scope of that powerful phrase, "All men. . . ."

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INDIVIDUAL RIGHTS

hot off the press

***Congress shall make no law . . . abridging the freedom of speech or of the press . . .*—Article the First, Bill of Rights, U.S. Constitution, 1789.**

"We must be willing to surrender a small measure of our liberties to preserve the great bulk of them."—Clarence Kelley, FBI director, 1975.

The above statements bear close scrutiny, particularly in a bicentennial year when League members and many other citizens are re-examining the *Federalist Papers.* Those essays, published in New York newspapers in the 18th century, were written by Madison and other Founding Fathers—the very people who drafted the Bill of Rights.

Jack C. Landau, Supreme Court reporter for Newhouse Newspapers and steering committeeman for the Reporters Committee for Freedom of the Press, told this magazine on September 11: "There are more threats to the First Amendment today than in my lifetime."

If it please the court

Montreal became a forum late last summer for discussion of individual liberties of U.S. citizens. The American Bar Association heard FBI director Kelley's defense of illegal wiretaps by various intelligence agencies the day after its board of directors had urged the association to stand firm against another effort to trim individual liberties. Provisions in a proposed revision of the federal criminal code (S-1) would impose criminal penalties on reporters and news media for publishing "national defense information"—as such material is now nebulously designated—without government release.

A day earlier, the ABA's committee on fair trial and free press, made up of judges and lawyers, had debated a proposal from the Reporters Committee for Freedom of the Press. It outlined procedures for the press and officers of a court to work out guidelines for reporters to cover trials in the public interest without "gag" orders or other court-imposed restrictions that reporters have always considered in violation of the First Amendment.

To quote from the proposal: "The new fair trial-free press dispute is much broader and has brought the press in *repeated* and *direct* conflict with the courts rather than with the police through prior restraint orders, contempts and jailings. . . .

"The press believes that the government simply may not ban the publication of information and ideas—no matter how unpopular or odious—except perhaps in the narrowly defined case of a 'clear and present danger to the national security.' . . .The media would generally argue that the First, Fourth, Fifth, Sixth, and Fourteenth Amendments confer upon the public and the press broad rights to know about the operations of the judicial branch. . . .

From LWVUS Principles:

- The League of Women Voters believes in representative government and in the individual liberties established in the Constitution of the United States.
- The League of Women Voters believes that democratic government depends upon an informed and active participation of its citizens and requires that governmental bodies protect the citizen's right to know by giving adequate notice of proposed actions, holding open meetings and making public records accessible.

"The general infirmity of many gag orders involved is compounded by the fact they are imposed without any opportunity for notice or hearing on the part of those most directly affected—members of the news media."

The proposal faces opposition, even from reporters, notably, those who would sooner reserve the option to break a court order. Many ABA members feel it is too radical and that no judge wants those procedures approved. As the proposal suggests, "Restrictive orders would not be binding until approved pursuant to notice to representatives of the press and a full hearing. The contrary approach, i.e., ignoring the interests of the press and the public and forcing the press to assert its rights after the fact, limits the free exercise of vital First Amendment rights and subjects the press to an irreparable injury for which there is no relief."

Asked to comment on the Reporters Committee proposal, which he had drafted, Landau said, "My proposal was that the press be given *conventional due process rights.* With very rare exceptions, public interest parties get due process—whichever ones you want to pick. Only the press, thus far, cannot appeal a judge's order. A reporter has only two options: break the order and face contempt of court, or abide by what he or she feels is an unconstitutional order. Actually it's a very conservative proposal. What we are trying to do is *get judges and reporters to talk to each other.* It's only radical insofar as judges now have absolute authority to limit access to the judicial process. From the point of view of conventional law, this is unfair. You could seal off a courtroom and hold a secret trial."

The battlecry over S.1

The Federal Criminal Code Reform Act of 1975 (S.1) adds enormously to the building pressures on the news media. It is 90 percent the offspring of an older bill, S.1400, dating from March 13, 1973. If passed, S.1 will greatly limit the news media's ability to report federal corruption and unconstitutional acts, particularly in the area of national defense. The new bill was introduced early this year by Senators John L. McClellan (D-AR) and Roman L. Hruska (R-NE).

The document, currently 799 pages, has a long history. It was drafted, in the main, by the Justice Department under various attorneys-general. The original impetus was the Nixon Administration's "war on crime," but the provisions aimed at the press—only a small segment of this magnum opus—reflect that administration's "war on the press." The media's barrage of investigative reporting in the Watergate scandal evoked still more backlash.

The bill has been seen as perhaps the first rational criminal code in the nation's history, on the one hand, and a chilling repression of free speech and press on the other. Its deletion of the clause about leaking and/or publishing official secrets to the extent of "clear and present danger" to the national security would bind and gag conscientious federal officials as well as the mass media.

This revision of the federal code would, in effect, void the Supreme Court decision on the publication of the Pentagon Papers. Moreover, the administration has sallied forth with a new hypodermic. A new definition of "government property" in S.1, to cover even "literary property," could make a government official criminally liable for leaking such information and hold the reporter of it in contempt of court—*automatically.*

On April 17, 1975, Fred P. Graham (CBS News) and Landau delivered, before the Senate Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, a statement from the Re-

porters Committee for Freedom of the Press. It stated, in part: "We think that the Congress ought to, in every possible way, encourage the press to inform the public about the way its government operates in all areas, whether it be the Department of Health, Education and Welfare, the Department of Justice or the Departments of State and Defense. . . .

"We would therefore respectfully submit to the Subcommittee that it, under its power to control the federal criminal law, remove the statutory power of the federal courts to hold a newsperson in contempt for refusing to disclose the source of unpublished information obtained during his (sic) news-gathering activities. This would remove federal statutory authority for the contempt prosecutions. We would further suggest that the Congress bar the federal government, via the Attorney General, from prosecuting such a claim on behalf of the court. This would leave the court in a common law position of enforcing its own decrees without the help of the federal government. We suggest this because *we have little confidence, based on past experience, that the federal government's attitude toward the protection of confidential news sources is in any way consistent with the First Amendment guarantees."* [Emphasis added.]

The Washington *Post*, one of the foremost irritants of recent administrations, carried a front-page article on S.1 last September 29. Staff writer John P. MacKenzie cited sources who said the bill was virtually "unamendable."

Jack Landau commented on S.1 on September 11. "If I were on the administration's side of the fence," he said, "I'd say that S.1 is a beautiful, marvelous job. They constructed this whole elaborate net, and there are virtually no defenses."

He said that S.1 has become "a battle-cry" in freedom of the press issues. "It is the one issue that affects all news media commonly," he remarked. "A lot of small papers are affected, but the provisions of S.1 are so bad that the bill affects all. As it is, freedom of the press is not just a federal problem. The great volume of cases are state cases—state supreme courts, trial courts in some 14,000 counties. There has been an enormous increase in litigation against the press. In our first *Press Censorship Newsletter,* two and a half years ago, we indexed some 30 cases. Now it's 300."

One of the wise men—all of them journalists—whose commentary became the basis for the Bill of Rights, was Thomas Paine. In the mid-1790s, while imprisoned in France during the Reign of Terror for espousing democratic freedoms, he penned his famous *The Age of Reason.* Among the maxims and prods to conscience are these words: ". . . though every created thing is . . . a mystery, the word mystery cannot be applied to moral truth, any more than obscurity can be applied to light. . . . Mystery is the antagonist of truth. It is a fog of human invention, that obscures truth, and represents it in distortion. Truth never envelopes *itself* in mystery; and the mystery in which it is at any time enveloped, is the work of its antagonist, and never of itself."

versus
the right to be let alone

***The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.*—Article the Fourth, Bill of Rights.**

At the close of the late '60s, police had a bad name in Chicago. Certain police officers became the subject of civil suits as well as criminal charges. Elmer Gertz, a noted Chicago lawyer, successfully

pressed a number of civil suits against a particular policeman. Then, in early 1969, an article in the John Birch Society magazine, *American Opinion,* called Gertz a "Leninist" and a "Communist fronter" who was part of a Communist conspiracy to discredit the Chicago police.

To protect his good name and his livelihood as an attorney, Gertz filed suit in Chicago and won a $50,000 judgment for libel damages. An appeals court set it aside. Gertz carried his case to the U.S. Supreme Court: thus, *Gertz* v. *Robert Welch, Inc.* (publisher of *American Opinion*).

On June 25, 1974 the U.S. Supreme Court ruled against the John Birch Society but left it up to the state of Illinois to ultimately decide on Gertz's damage award.

"The case is now back in federal court," Gertz commented more than a year later. "Welch has since published material that is in essence a repetition of the original offenses."

Gertz v. *Robert Welch, Inc.* is a landmark high court decision on libel that has had an abrasive effect on the Fourth Amendment as well as the First. The point of friction between the two is the citizen's right of privacy versus the public's right to know—that is, the press's right to tell. As a result of what is called the *Gertz* decision, questions of when and how the citizen's privacy is protected from the press must be variously decided on a state-by-state, case-by-case basis.

Rights in conflict

It was the majority opinion of the U.S. Supreme Court, written by Justice Louis Brandeis in *Olmstead* v. *U.S.* (1928), that attached our right of privacy under the Fourth Amendment. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness," Brandeis wrote. ". . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, *as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."* [Emphasis added] Free press, too, is *as against the government.*

Previous to the *Gertz* decision, the U.S. Supreme Court had set some precedents to shield the press from libel suits by "public officials" (*New York Times Co.* v. *Sullivan,* 1964) and "public figures" (*Rosenbloom* v. *Metromedia, Inc.,* 1971). In order to collect damages for libel, those persons in the public eye must prove that defamatory statements were published with "actual malice"—that is, on the basis of falsehood or reckless disregard of the truth, whether what was published was false or not. Under the 1971 ruling, private individuals who happened to be in the public eye for a brief, newsworthy period were also covered by the "actual malice" doctrine. In most cases, these high court rulings served in the media's interest.

"But in 1974, a decade after the *Times* decision, the Supreme Court once again fundamentally altered the law of defamation in a decision which withdrew press protection in some ways, while extending it in others." So wrote Joel M. Gora, national staff counsel for the American Civil Liberties Union, in his book, *The Rights of Reporters* (N.Y.: Avon Books, 1974). His long chapter, "Libel and Invasion of Privacy," discusses in depth what the *Gertz* decision means to both the press and the citizen: "While the *Times* 'actual malice' requirement is still applicable in suits by 'public persons'—i.e., public officials and

You can follow up on issues of freedom of the press and the right of privacy by taking part in the activities sponsored by the American Issues Forum during the weeks of November 2 (press) and November 9 (privacy).

The League is a cooperating organization with the Forum, as it presents, week by week through next May, the "fundamental issues of our country."

These two aren't the only topics that tie in with League program interests. Congress and the presidency are late-November topics. "The Welfare State: Providing a Livelihood" is slated for the week of January 25. To join in exploring these and other topics:

☐ Start or join a local discussion group.
☐ Watch your television and radio listings for broadcast schedules.
☐ Look for "courses by newspaper" and other news media coverage.
☐ Take part in programs tied into the Forum schedule, sponsored by schools and colleges.

public figures—it no longer protects a reporter from liability in a suit by an ordinary private person."

According to Gora, a private citizen cannot collect libel damages without showing actual injury as a result of alleged defamation. These are called "actual damages," and a judgment must be based on "actual malice." *Presumed* damages (once awarded when actual damage was difficult to prove) and *punitive* damages (awarded to a plaintiff to punish the press) are difficult, if not impossible, to claim. Moreover, the Supreme Court left standards of "actual malice" and injury to be decided by state courts.

On the face of it, the press is in little or no danger. In reality, however, the *Gertz* decision is so little understood that any judge in a lower court can do with it what he will. Moreover, since June '74, the *Gertz* decision is spoken of as detrimental, even dangerous, to the news media and has further given "unintended powers" to libel lawyers.

Joel Gora points out some of the snags and snares set for reporters in his book. When asked to comment on his book last September, Gora said of the *Gertz* case: "There is no doubt about its impact on freedom of the press. The decision rewrites many rules of libel, diminishes rights of the press in some aspects, bolsters them in others. It's easier for private individuals to sue for defamation, but difficult to collect for damages. *Gertz* tightened up the rules so that juries cannot award damages just for the hell of it."

In many cases, however, they do. A few days after Gora's comments, Jack Landau said: "*Gertz* is very complicated and interpreted in the most confusing ways. Even now I don't think we have substantive evidence of real court trends. But the right of privacy issue will concern us more and more."

From the plaintiff

Elmer Gertz, a Chicago lawyer, author and long a champion of civil liberties, was present at the First Amendment Lawyers Conference in Washington, D.C. late last summer. On July 31 he discussed his own case from the previous year. "Late last summer I freely admitted after the Supreme Court decision that many things were unclear," he said. "Now, many things are a bit more clear."

What Gertz meant was that the *problems* are now seen more clearly:

☐ In defamation and privacy cases, are rulings based on generalities about all cases, or are there two sets of them—one for the mass media and one for other kinds of defamers (corporations, the advocacy press etc.)? This question is pertinent to house organs or such political publications as *American Opinion.* "There are certain rights that corporations . . . do not have," Gertz pointed out. "Many justices are unclear and unsure on this." Justice Potter Stewart, he said, thinks that there may be this distinction between kinds of cases. Justice Byron White, who dissented in the *Gertz* decision, doesn't make any distinction between the mass media and any other defamers of people.

☐ Beyond areas of defamation and into privacy cases as well, can a person ever recover for defamation or invasion of privacy if what is said is *not false* but merely uttered in bad faith? Gertz commented: "An old adage says, 'The greater the truth, the greater the libel.' *If there is truth there cannot be a case for defamation or invasion of privacy.* But this may be questioned by way of a complete constitutional defense." Therein lies the conflict: whether an individual's constitutional right to privacy can override First Amendment guarantees in the courtroom. As Gertz explained his own case last July, a civil liberties problem is clearly apparent.

Elmer Gertz believes that criminal libel laws are probably on the way out, and such matters will likely be confined to *civil* liability. However, he thinks that proven cases of invasion of privacy are likely to remain subject to criminal sanctions. As a civil liberties lawyer and journalist, Gertz knows well what the problems are:

☐ The public has the right to know.

☐ The individual has the right to privacy.

"With the influence of Watergate," Gertz said, "we'll soon have a redefinition of the right of privacy. Just watch what's happening in the Congress and in the courts and you'll see what's happening to your rights."

When Gertz spoke in that manner he was addressing not just one of the rights named above, but both.

ERA: what we have in common

1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

3. This amendment shall take effect two years after the date of ratification.
—Article the Twenty-Seventh, U.S. Constitution: proposed by Congress March 22, 1972, ratified by 34 states.

Early last September, President Ruth Clusen sent a five-minute taped message to state and local LWV presidents and ILO presidents. Comparing the ERA ratification campaign to the women's suffragist movement in the early part of this century, Mrs. Clusen said that dollars must back up words and sentiments and that those dollars are needed *now.* Women's suffrage took years to achieve, and "it takes us just as long to achieve equality under the law," Mrs. Clusen said. "The right of all citizens to be treated as individuals is at stake in the campaign to ratify ERA. This country cannot afford inequality. . . ."

Women's right to vote dates from the ratification of the 19th Amendment in 1920. This amendment was an amplification of the 14th (1868), which gave all *persons* born or naturalized in the U.S. the right of citizenship and due process of law but only reinforced the right of *males* over 21 to vote. To get women's suffrage took almost 52 years. Another 55 have gone by, and still no ERA.

Seen another way, the securing of equal rights for women is a process that's been going on since the late 18th century—a process of defining, protecting and expanding individual rights. The Bill of Rights, dating from the nation's earliest days, set forth the first ten of these rights. The vagaries of history and of human nature have necessitated that the good fight go on. Ironically, lawmakers have managed the challenges of our diversity of races, creeds and ages and missed the most basic dichotomy of all—man and woman.

The League and its allies have decided to implement a *positive strategy,* instead of counterpunching the opposition's arguments—whether those arguments stand on two feet or four. There is a very positive message to deliver—that each of us, every woman, every man, *needs* the Equal Rights Amendment. The wording of the bill that heads this article will guarantee individual rights to everyone, and thereby better the conditions of life in America.

Inasmuch as the Constitution purports to guarantee individual rights to all, as it stands, why is ERA necessary? The answer: because federal and state laws continue, in the '70s, to be interpreted and enforced on sex-based discrimination, just as many were along *racial* lines before the Civil Rights Act of 1964.

The Roper poll

Is there a national climate of opinion—a national state of mind—conducive to extending constitutional guarantees across sex barriers? The answer is YES.

A survey was conducted last June 14-21, 1975, by Roper Research, Inc. The sample, though small (2,004 persons), is a representative cross-section of the adult population of the continental U.S. Results showed that of all interviewees, *61% favor ERA;* 20% are opposed; 19% have mixed feelings about it. When Roper asked the 39% of the sample who did not favor ratification, either by negative feelings or ambivalence, this is how they responded to some basic opposition statements:

☐ "Because men and women are inherently different, women shouldn't have the same rights as men." Only 5% agreed.

☐ "Women would be under the same responsibilities as men: the draft, jury duty, paying alimony if they earn more than their husbands. Women shouldn't be subjected to these responsibilities." Only 11% agreed.